Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266 MM Docket No. 93-215
	)	
Adoption of Uniform Accounting System for the Provision of Regulated Cable Service	)	CS Docket No. 94-28
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

COMMENTS OF THE STATE OF HAWAII

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SUMMARY

The State of Hawaii (the "State" or "Hawaii") supports the Commission's proposal for a long overdue housecleaning of the Commission's rules for the regulation of rates for the basic service tier ("BST") of cable television services in communities that continue to lack effective competition. The scope of this cleanup, however, should be limited to removing rules that are outdated and inapplicable to the BST rate setting process.

The Commission should not attempt a major restructuring of its cable rate regulations.[1] Given the small number of communities and cable operators that remain subject to rate regulation, any major overhaul would constitute a tremendous waste of administrative resources for the Commission, franchising authorities, and the sole cable operator that is currently subject to rate regulation. Although the State empathizes with the Commission's desire to simplify the rate setting process, rate regulation in any industry is always complex and cannot be achieved in a reliable and effective manner using unstructured negotiations between cable operators and franchising authorities,[2] or as a result of cable operators setting their own benchmarks.[3]

It would also be inappropriate for the Commission to revise its interpretation of Section 623(b)(5) of the Communications Act with respect to whether equipment used to receive the BST should be exempt from rate regulation if the equipment can also be used to receive other cable services.[4] Such a revised interpretation would be inconsistent with the clear intent of

[1] *See* Modernization of Media Regulation Initiative, *Further Notice of Proposed Rulemaking*, MB Docket No. 17-105, *et al.*, ¶ 8 (Oct. 23, 2018) ("*FNPRM*").

[2] *See id.*, ¶ 11.

[3] *See id.*, ¶¶ 13-14.

[4] *See id.*, ¶ 17.

Congress and would permit cable operators to completely avoid regulation of cable equipment simply by only offering equipment that is capable of mixed use.

It would also be inappropriate to conclude that Congress intended to exempt commercial subscribers from the protections of rate regulation, which was clearly intended to apply to all subscribers regardless of their nature.[5] As the Commission has acknowledged, Congress' separate use of the term "households" in the effective competition portion of the statute was likely intended to reflect the use of this term in census data and not to limit the scope of subscribers that could benefit from rate regulation.

If the Commission decides to replace its initial rate setting methodology for cable operators that become regulated for the first time or become re-regulated,[6] the starting point for such initial rates should be the operator's BST rates that were last approved by the franchising authority just before BST rate regulation was eliminated for that cable operator. As for those cable systems that are newly subject to rate regulation (having never been subject to rate regulation in the past), a new mechanism would be needed to reach back to a point in time when that operator was clearly subject to effective competition.

With respect to the other changes to the Commission's cable rate rules addressed in the *FNPRM*, such changes should be made only when they would succeed in streamlining the rules without potentially harming the integrity of the rate setting process. For example, the State does not object to the elimination of the Form 1210 quarterly rate adjustment process since this process does not seem to be commonly used by cable operators.[7]

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[5] *See id.*, ¶ 19.

[6] *See id.*, ¶¶ 20-25.

[7] *See id.*, ¶ 27.

The Commission, however, must retain the requirement that BST rates must be adjusted downward by the per channel residual amount when a channel is removed from the BST.[8] Difficulties in calculating the per channel residual that should be added to the BST when a channel is added does not justify eliminating this equitable and necessary rate adjustment.

The Commission should clarify that a cable operator that refrains from passing through all of its recoverable costs to subscribers in its regulated rate cannot later collect accrued interest from subscribers on those deferred charges.

The State acknowledges that it may be appropriate to permit cable operators to revise their allocations for recovering the costs of significant network upgrades based on changed circumstances.[9] Any such adjustment process, however, should not permit cable operators to increase the per subscriber cost of a prior upgrade to compensate for a reduction in subscriber count in the years following an upgrade.

The State also agrees that cable operators must be prevented from double recovering the same depreciation expenses from subscribers since such a capability would be inequitable and contrary to the public interest.[10]

The State further agrees with the Commission with respect to the elimination of such forms as Forms 1211, 1215, 1225 and 329.[11] In addition, the mid-year adjustment mechanism for cable rates specified in Section 76.922(e)(2)(iii)(C) should be eliminated as unnecessary.[12]

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[8] *See id.*, ¶¶ 28-30.

[9] *See id.,* ¶ 31.

[10] *See id.*, ¶ 33.

[11] *See id.*, ¶ 34.

[12] *See id.*, ¶ 36.

The Commission, however, should only modify and not eliminate Section 76.980 of its rules, which addresses unreasonable charges for changes in a subscriber's selection of services and equipment that is subject to regulation.[13] For example, any decision by a subscriber to downgrade from a combination of the cable programming service tier ("CPST") and BST offerings to solely the BST offering should remain subject to the restrictions on unreasonable charges.

The State concurs with the *FNPRM* proposal to eliminate as likely unnecessary the exception that exists in Section 76.982 for cable franchise agreements entered into before July 1, 1990 allowing such agreements to supersede Section 623 of the Communications Act.[14]

The Commission, however, must retain its prohibition on cable operators charging different prices for the same services within different portions of the same franchise area when effective competition may be absent in a portion of the franchise area.[15] Such pricing flexibility would permit operators to undercut and prevent competitive entry in some neighborhoods, while charging anticompetitive rates in other areas where competitive entry is less likely.

The Commission should also retain with modifications Section 76.963 of its rules, which addresses the Commission's forfeiture authority when cable operators fail to comply with Commission orders.[16] Although the rule no longer needs to reference unreasonable rates for CPST offerings, the rule should continue to reference unreasonable rates for equipment.

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[13] *See id.*, ¶ 37.

[14] *See id.*, ¶ 38.

[15] *See id.*, ¶ 39.

[16] *See id.*, ¶ 40.

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COMMENTS OF
THE STATE OF HAWAII

The State of Hawaii (the "State" or "Hawaii"),[17] by its attorneys and pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") rules, 47 C.F.R. § 1.415, hereby submits the following comments in response to the Further Notice of Proposed Rulemaking ("*FNPRM*") on the rules governing the statutory process for rate regulation of cable television services.[18]

The State supports those initiatives and proposals in the *FNPRM* that are consistent with the original intent of this proceeding, which was to perform a much needed cleanup of those portions of the cable rate regulations that are outdated and inapplicable to the rate setting process

[17] These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs ("DCCA"). In Hawaii, the cable franchising process is managed by the DCCA, rather than by a local or regional governmental body.

[18] Modernization of Media Regulation Initiative, *Further Notice of Proposed Rulemaking*, MB Docket No. 17-105, *et al.* (Oct. 23, 2018) ("*FNPRM*").

for the basic service tier ("BST") of cable television services in communities that continue to lack effective competition. The State, however, does not support proposals for a complete or substantial overhaul of the cable rate regulations. Given the small handful of communities that continue to regulate rates for cable television service, combined with the fact that only one cable television operator is currently subject to regulated rates, it would constitute a tremendous waste of administrative resources—for each of the Commission, affected franchise authorities, and the sole affected cable television operator—to develop and implement entirely new procedures for setting BST rates for cable television services.

I. NO JUSTIFICATION EXISTS FOR ENGAGING IN SUBSTANTIAL CHANGES TO THE EXISTING RULES FOR CABLE TELEVISION RATE REGULATION

As the *FNPRM* observes,[19] this proceeding was prompted at the suggestion of NCTA and ITAA in comments and reply comments that they filed with the Commission in 2017.[20] Importantly, neither party advocated for a wholesale revision of the cable rate regulations. Instead, NCTA observed that "some existing rate rules address defunct Commission authority over cable programming service tier regulation, and therefore should be eliminated as a matter of regulatory clean-up."[21] ITAA concurred, recommending the Commission "look closely" at its rules for cable rate regulation "with the goal of completing a long overdue clean-up."[22]

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[19] *See id*, ¶ 1.

[20] *See* Comments of NCTA – The Internet and Television Association, MB Docket No. 17-105, at 22-23 (July 5, 2017) ("*NCTA Comments*"); Reply Comments of ITTA – The Voice of America's Broadband Providers, MB Docket No. 17-105, at 12-13 (Aug. 4, 2017) ("*ITAA Comments*").

[21] *NCTA Comments* at 23.

[22] *ITAA Reply Comments* at 13.

The State supports this proposal, but only this proposal. Although apparently well intentioned, much of the *FNPRM* reaches substantially beyond the needs of a thorough housecleaning, requesting comment on proposals that are much more synonymous with demolition and new construction. For example, the *FNPRM* seeks comments on, *inter alia*, "replacing our existing complex rate regulation framework with a new and simple methodology."[23] Although simplicity is clearly an admirable objective, decades of experience has demonstrated that rate regulation, in any form or industry, is never a simple undertaking. Rate regulation requires an active and ongoing process of reassessment and refinement in order to achieve its statutorily requirements, which, in this case, is to ensure that, where cable television systems are not subject to effective competition, "consumer interests are protected in receipt of cable service."[24]

Wholesale replacement of the rate regulations is also ill advised given the relatively small number of consumers that continue to benefit from cable rate regulation and the even smaller number of cable operators that must comply with its requirements. As the *FNPRM* acknowledges,[25] BST rate regulation continues to exist only in Kauai, Hawaii; in a modest number of smaller communities in Massachusetts; and applies to a single cable television operator, Charter Communications. Thus, the potential benefits of substantial changes to the rules for cable rate regulation would be exceedingly modest, if there are any benefits at all.

Due to the current long established method of rate regulation, any new approach—no matter how simple in concept—would impose a substantial learning curve both for the federal,

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[23] *FNPRM*, ¶ 2.

[24] Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, 102d Congress, § 2(b)(4) (Oct. 5, 1992) ("*1992 Cable Act*").

[25] *See FNPRM*, ¶ 6.

state and local regulators that must implement the rules and the sole cable operator that must comply with them. Therefore, the Commission should appropriately refrain from attempting a substantial rewrite of its cable rate regulations, engaging only in a targeted parsing of those sections that are no longer relevant to the existing rate setting process.

A. The Commission Cannot and Should Not Replace its Rate Regulation Rules With a Negotiated Approach Based on the Seven Statutory Factors

The Commission does not have statutory authority to eliminate its rate regulations and direct cable operators and franchising authorities to negotiate reasonable rates for the basic service tier based solely on the seven factors enumerated in Section 623(b)(2)(C) of the Communications Act.[26] By its terms, the statute instructs that the seven factors are to be used by "the Commission" for the process of "prescribing such regulations," and not cable operators and franchising authorities for setting their own rates.[27] Further, certain of the seven factors require Commission interpretation, including joint and common costs "in accordance with regulations prescribed by the Commission"[28] and a reasonable profit "as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1)."[29] The Commission would clearly be abrogating its statutory responsibilities under these provisions by shifting responsibility for the interpretation and exercise of the Section 623(b)(2)(C) factors to local authorities and cable operators in the rate setting process.

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[26] *See FNPRM*, ¶ 11 (*citing* 47 U.S.C. § 543(b)(2)).

[27] 47 U.S.C. § 543(b)(2).

[28] 47 U.S.C. § 543(b)(2)(C)(iii).

[29] 47 U.S.C. § 543(b)(2)(C)(vii).

Second, such an approach would be ill advised because it inappropriately assumes the existence of a level playing field for negotiations between cable operators and franchising authorities. Major system operators ("MSOs") are increasingly resistant to disclosing to the franchising authority detailed financial and operational information about the local cable system (aggregating it instead with information for the MSO's other cable systems), thus impairing the ability of franchising authorities to make informed decisions in the negotiating process. Coupled with this is the fact that franchising authorities may not unreasonably refuse to grant a cable franchise, or renew a franchise if the basic statutory criteria for renewal is satisfied.[30] As a result, any rate setting approach that involves a largely unstructured negotiation between cable operators and franchising authorities would be highly unlikely to produce constructive results.

B. The Commission Also Cannot and Should Not Authorize Cable Operators to Set Regulated Rates Based on the Rates They Charge in Other Communities

The Commission should not adopt a proposal of allowing cable operators to justify their regulated cable rates based on comparisons to the rates that they charge for comparable offerings in other communities.[31] First, although there are often a lot of similarities between the cable programming service tier ("CPST") offerings in different communities, such similarities rarely extend to the BST. Instead, in each community, the BST is very unique, entailing a mix of local television broadcast channels; public, educational and government ("PEG") channels; and other channels that often include locally originated programming produced by the cable operator specifically for that community. Thus, any attempt to make substantive comparisons between the BST offerings in different communities would quickly devolve into an endless process of

[30] *See* 47 U.S.C. § 546 (articulating the franchise renewal criteria).

[31] *See FNPRM*, ¶ 13.

identifying exceptions and distinctions in the various BST offerings and trying to quantify the value of those exceptions and distinctions for purposes of rate setting.

Such a process would likely become even more difficult if large MSOs establish blanket Updated Comparative Benchmarks or UCB (as described in the *FNPRM*) without disclosing to franchising authorities the details of the BST offerings for each of the communities that were incorporated into the UCB and the assumptions that were employed in calculating the benchmark. As DCCA noted in the previous subsection of these comments, large MSOs have become increasingly reluctant to disclose detailed information about their offerings in individual communities, choosing instead to aggregate such information on a system wide basis, making it of little or no use in conducting a fair analysis of the BST rates that should be charged in a community that lacks effective competition.

In addition to being ineffective, such an approach would suffer from the same statutory deficiencies that are discussed in the previous subsection in that it would clearly result in the Commission's abrogation of its responsibilities to establish regulations for the setting of regulated rates in conformance with Section 623(b)(2) of the Communications Act.[32] Therefore, the Commission should not discard the decades of experience and expertise that has been developed by the Commission, franchising authorities and cable operators in the BST rate setting process in order to replace it with insufficient and statutorily impermissible concepts for rate setting that would be far more likely to result in litigation than to produce results that would serve the public interest of consumers receiving cable television services.

[32] *See FNPRM*, ¶ 14 (raising a question about whether the proposed UCB approach would violate Section 623(b) of the Communications Act).

II. NO JUSTIFICATION EXISTS TO REVISIT THE COMMISSION'S INTERPRETATION OF THE STATUTORY REQUIREMENT THAT EQUIPMENT USED TO RECEIVE BASIC SERVICES IS SUBJECT TO RATE REGULATION

The Commission was clearly correct in originally determining that all equipment used to receive the BST of cable service is subject to rate regulation even if that equipment can also be used to receive other services.[33] Absent such a decision, cable operators would be able to completely avoid rate regulation of cable equipment simply by only offering equipment that is capable of mixed use—as many, if not most, cable operators already do.

In considering a reinterpretation of the Section 623(b)(5) requirement, the *FNPRM* incorrectly suggests that the Commission acknowledged in its 1993 decision that it was adopting an "expansive reading" of the statute and that its interpretation "would warrant further review in the future."[34] In fact, what the Commission then concluded was that, based on the intent of Congress, the Commission was "*obligated* to give the term 'used to receive basic tier service' an expansive reading . . .."[35] Thus, the use of an expansive reading was required by Congress, it was not a discretionary undertaking of the Commission. Further, there is no language in the Commission's 1993 order suggesting its decision on this issue might warrant further review in the future. Instead, the only thing that the Commission acknowledged would warrant further study is whether an effective competition test could be developed in the future to determine when competitive markets for cable equipment were sufficient to make the regulation of

[33] *See id.*, ¶ 17.

[34] *See id.*

[35] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5802, ¶ 283 (1993) (*emphasis added*).

equipment rates unnecessary.[36] This is an entirely different issue than whether equipment "used" to receive the BST includes equipment that can also be used to receive other services.

The Commission's 1993 decision to subject all equipment used to receive BST services to rate regulation was also supported by the U.S. Court of Appeals for the D.C. Circuit, which observed that any attempt to limit rate regulation to equipment used "exclusively" to receive the BST "does violence to the natural meaning of the term 'used': that term is not normally understood to mean 'used exclusively,' which is effectively the interpretation [the cable operators] propose."[37]

Given the strong statutory basis for subjecting all equipment used to receive the BST to rate regulation, and the industry's reliance on this approach for more than two decades, the Commission would face a significant burden in justifying any new interpretation of the law so many years after it was adopted. As the courts have explained, when an agency changes its interpretation of a statute or implements a new policy, it may not do so *sub silentio* or simply disregard rules that are still on the books.[38] Instead, the agency must show that there are good reasons for any new policy that it adopts.[39] Further, when an agency's new policy disregards certain facts that undergird its prior policy, or when its prior policy "has engendered serious reliance interests," it would be arbitrary or capricious to ignore these issues without providing a justification for doing so.[40]

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[36] *See id.*, ¶ 282 (acknowledging that "we do not have the information we would need to establish an effective competition test for equipment and installation at this time").

[37] *Time Warner Entertainment v. FCC*, 56 F. 3rd 151, 177 (D.C. Circuit 1995).

[38] *See United States v. Nixon*, 418 U.S. 683, 696 (1974).

[39] *See id.*

[40] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

In this case, the Commission's original interpretation was supported by a clear understanding that exempting mixed use equipment from rate regulation would effectively permit cable operators to avoid rate regulation of equipment altogether. The facts that supported this decision are even more true today—most, if not all, cable equipment leased today supports multiple tiers of service. Therefore, no justification exists to change the Commission's rules with respect to the regulation of cable equipment and it would be arbitrary and capricious for the Commission to do so in this proceeding.

III. STATUTORY RATE REGULATION WAS CREATED TO BENEFIT ALL SUBSCRIBERS OF CABLE TELEVISION SERVICES, INCLUDING COMMERCIAL SUBSCRIBERS

The *FNPRM* is incorrect in asserting that Congress did not intend to include commercial subscribers of cable television services within the statutory definition of "subscribers."[41] When Congress adopted its rate regulation requirements, it made no distinction between residential and commercial subscribers, likely because both classes of subscribers were subject to the same excessive price increases and lack of choice that prompted Congress to adopt rate regulation requirements in the 1992 Cable Act.[42] Yet, faced with no suggestion either within the text of the statute or in its legislative history that any distinction was intended by Congress between residential and commercial subscribers, the *FNPRM* seeks to create such a distinction based on unrelated references within the statute to the term "households" when determining whether effective competition exists within a community.[43]

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[41] *See FNPRM*, ¶ 19.

[42] *See 1992 Cable Act*, § 2(a) (noting that monthly cable rates had increased at almost three times the rate of the Consumer Price Index and the fact that most cable systems then faced no local competition).

[43] *See FNPRM*, ¶ 19.

As the Commission has previously acknowledged, Congress' references to "households" within the statute were likely based on the use of this same term by the Census Bureau in reference to occupied housing units.[44] In this way, Congress provided an objective means to determine when its various thresholds for effective competition were met (*i.e.*, based on the census data for households in a franchise area), which the Commission appropriately reflected in its case law by permitting cable operators to use census data to demonstrate whether effective competition existed in a community. In contrast, if Congress had used the term "subscribers" in the effective competition portion of the statute, then a new process would have been needed to quantify the number of subscribers versus non-subscribers in each community, which would have been difficult since the census does not employ such terminology.

The use of common terminology in the effective competition portion of the statute, however, does not suggest any intent to apply this same terminology to other sections of the statute, such as in the definition of the term "subscribers." Instead, the fact that Congress declined to separately reference "household subscribers" as compared to "commercial subscribers" indicates the opposite intent. Further, any attempt to impute a distinction between household subscribers and commercial subscribers in Section 623 of the Communications Act would potentially disrupt other regulatory provisions.

For example, such a distinction would bring into question whether cable operators have any obligation to provide the BST in any form to commercial subscribers (as compared to household subscribers) regardless of the price. Section 623(b)(7)(A) states only that cable

[44] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 and 92-262, *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4324 (1994) (*citing* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8).

operators must provide the BST to "subscribers" without explaining whether this reference includes commercial subscribers. It is also unclear whether the prohibitions on discrimination[45] and negative option billing[46] apply solely to household subscribers or to commercial subscribers as well. The text of the Communications Act and its legislative history provide no insight into this issue because such insight was unnecessary. Section 623 references only "subscribers" because Congress adopted Section 623 to protect all subscribers, including those that exist as commercial establishments. Therefore, the Commission should adopt rules that are consistent with this Congressional intent by applying its rate regulations to all subscribers of cable television services regardless of whether the subscriber is an individual or a business.

IV. IF THE COMMISSION REPLACES ITS INITIAL RATE SETTING METHODOLOGY, THE NEW APPROACH SHOULD BE TIED TO THE MOST RECENT COMPETITIVE OR REGULATED RATES FOR THAT COMMUNITY

The *FNPRM* proposes to replace the Commission's initial rate setting methodology with a new approach for cable operators that become regulated for the first time or become re-regulated, presumably because of a loss of effective competitive conditions.[47] The State acknowledges that the current approach for setting initial rates may be impractical in its use of financial data that is more than two decades old. At the same time, it would be entirely inappropriate to use an operator's actual BST rates at the time of re-regulation as a starting point for setting regulated rates given that those BST rates reflect insufficiently competitive conditions.

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[45] *See* 47 U.S.C. § 623(e).

[46] *See* 47 U.S.C. § 623(f).

[47] *FNPRM*, ¶ 21.

Instead, for any cable operator or cable system that is re-regulated, the starting point for establishing its regulated rates should be the BST rates that were last approved by the franchising authority just before BST rate regulation was eliminated for that cable operator. Such an approach would be appropriate for two reasons. First, in many cases, the removal of rate regulation for that operator resulted from a finding by the Commission that effective competition existed in that community, meaning the BST rates in place at that time reflected competitive conditions. Second, even if effective competition did not yet exist when rate regulation ended for a particular operator, the last rates approved by the franchising authority still reflected a rate level that was adequately reviewed by the franchising authority and therefore reflect a credible foundation on which new regulated rates can be established.

As for those cable systems that are newly subject to rate regulation (having never been subject to rate regulation in the past), some form of mechanism would be needed to reach back to a point in time when that operator was clearly subject to effective competition. The cable operator's BST rates for that period could form the basis on which current regulated rates could be calculated. Unfortunately, the State acknowledges that although such an approach would be equitable, it may be difficult to determine on an objective basis the most appropriate point in time to use as a starting point when effective competition still existed and the operators BST rates presumably reflected those competitive conditions.

V. THE COMMISSION SHOULD MAKE MODIFICATIONS TO ITS RULES AND PROCEDURES FOR RATE INCREASES ONLY IF THEY WILL CLEARLY IMPROVE THE RATE SETTING PROCESS

The *FNPRM* proposes a number of changes to the rules governing modifications to regulated BST rates. The State supports those changes that would succeed in streamlining the process without potentially harming the integrity of the rate setting process.

A. The State Does Not Object to the Elimination of the Form 1210 Quarterly Update Process

The State does not object to the elimination of the Form 1210 quarterly update process for adjusting regulated rates on a quarterly basis.[48] The State does not recall an occasion when a cable franchisee serving portions of Hawaii employed the quarterly adjustment process. The State acknowledges, however, that the experience of other franchising authorities in other communities may be different in this respect.

B. The Commission Must Retain a Requirement that the Per Channel Share of the Residual Portion of the BST be Removed When a Channel is Removed From the Basic Tier

The Commission's existing rules for the treatment of per channel residual amounts are based on a simple equitable concept—BST subscribers should be required to pay only for those channels that they receive and should no longer be required to pay for channels that are removed from the basic tier. Despite the obvious equities of this requirement, the *FNPRM* proposes the elimination of this adjustment for reasons that are clearly inadequate.

As the *FNPRM* seems to acknowledge, when a channel is removed from the BST, no difficulty exists in calculating the per channel share of the residual that must be removed from the BST rate. Thus, this straight forward concept of charging less money for less programming can and should remain in place.

The *FNPRM* raises concern, however, regarding the appropriate calculation of the per channel residual amount that should be added to the BST when a channel is moved from a CPST to the BST given the fact that the CPST is no longer regulated and, therefore, the calculation of the residual amount that should be moved is more difficult. The solution to this issue, however,

[48] *Id.*, ¶ 27.

is not—as proposed in the *FNPRM*—the elimination of the entire residual adjustment process since that would permit cable operators to use the channel movement process to harm BST subscribers. Instead, the solution is to develop a new method to determine the per channel residual that should be added to the BST rate when a new channel is added to the BST. For example, one might consider the process that is currently employed when a new channel is added to the BST that was not moved from another tier because it is an entirely new channel for that cable system. The State would be willing to consider other options as well and will review with interests the comments of other parties. Regardless of whether a new approach is developed to calculate the per channel residual that should be added to the BST rate when a new channel is added to the BST, the Commission should not under any circumstances consider the elimination of the current requirement that the per channel residual of a channel that is removed from the BST must also be removed from the BST rate.

The Commission should also refrain from eliminating the process for rate adjustments based on changes in the total number of channels on the BST.[49] If changes are needed to the markup table that is used to calculate the per channel adjustment factor, then such changes should be proposed as a part of this proceeding. The Commission, however, should not consider the elimination of an equitable process simply because certain administrative components in the process might benefit from an update.

C. The Commission Should Clarify that Cable Operators Cannot Use Form 1240 to Accrue Interest on Costs That Were Not Passed Through to Subscribers

As the *FNPRM* acknowledges, every cable operator has a choice regarding whether to pass through all of its recoverable costs to subscribers in its regulated rate, or to accrue those

[49] *Id.*, ¶ 30.

costs and potentially pass them through to subscribers at a later date.[50] In exercising this discretion, however, cable operators cannot be permitted to assume the role of a compulsory credit card company by accruing interest on those deferred costs and later imposing those interest charges onto subscribers. Instead, the only charges that should appropriately be charged to consumers are the recoverable costs that are eligible for reimbursement either then, or deferred from some point in the past.

D. Cable Operators Should Not Be Permitted to Impose Additional Costs for Prior Upgrades in Response to Shrinking Subscriber Counts

The existing process for allocating the costs of significant network upgrades is designed to reflect the conditions that existed at the time of the upgrade in terms of subscriber and channel counts because it was based on those numbers that the upgrade was undertaken. The State is therefore reluctant to endorse significant changes to the cost allocation process that would permit cable operators to reapportion prior upgrade costs based on changes in conditions.[51] This said, the State agrees that, if there is a substantial increase in the number of BST subscribers in a cable system, it seems appropriate to reduce the per subscriber portion of the prior upgrade cost to reflect the increased revenue base. Further, if the number of channels in the BST increases proportionally to the entire system, then the BST rate should presumably bare a greater percentage of the prior upgrade cost.

The State, however, is concerned about any proposal to increase the per subscriber cost of a prior upgrade to compensate for a reduction in subscriber count in the years following an upgrade. In non-regulated businesses, a company's sunk capital costs must be borne by the

[50] *See id.* ¶ 31.

[51] *See id.*, ¶ 32.

company if those investments do not result in an increase in the customer base. Free market economics do not permit businesses to raise prices beyond the elasticity of demand in order to recover sunk capital costs. This same approach should be reflected in the Commission's rules. Specifically, if any changes are made that permit cable operators to reallocate portions of their network upgrade costs subsequent to their initial allocation, such rules should not permit operators to place a greater burden on a diminishing pool of subscribers.

E. Cable Operators Should Not Be Permitted to Twice Recover Their Depreciation Expenses

The State fully agrees that cable operators must be prevented from twice recovering the same depreciation expenses from subscribers since such a capability is inequitable and contrary to the public interest.[52] On its face, the proposed solution identified in the *FNPRM* may be sufficient to prevent this situation. The State, however, would prefer to reserve judgement on this approach based on its review of the comments filed by other parties.

F. The Commission Should Eliminate Forms that are Obsolete or Unnecessary Due to the Sunset of CPST Rate Regulation

The State agrees with the Commission with respect to the elimination of certain forms as no longer necessary.[53] Specifically, Form 1211 will no longer be needed if the Commission eliminates the quarterly rate adjustment process. In addition, Forms 1215 and 329 appear to be relevant only to the CPST rate regulation process. Finally, as the Commission observes, Form 1225 has been superseded by Form 1230. Therefore, unless another commenter in this

[52] *Id.*, ¶ 33.

[53] *Id.*, ¶ 34.

proceeding identifies a substantive need for retaining any of these forms, the State concurs with their elimination.

VI. THE COMMISSION SHOULD EXERCISE CARE IN ELIMINATING REGULATIONS THAT MAY NO LONGER BE NEEDED FOR CPST RATE SETTING

The *FNPRM* seeks comment on the potential elimination of a number of regulations that are relevant, at least in part, to the prior rate setting process for the CPST of services.[54] In certain cases, the proposed removal of the rules may be appropriate. In other cases, however, the targeted rule also remains relevant to the ongoing BST rate setting process. In such cases, the identified rule should be retained by the Commission or modified to address BST regulation along with equipment used to receive BST services.

A. The Commission Should Eliminate the Mid-Year Rate Adjustment Mechanism of Section 76.922(e)(2)(iii)(C)

The State agrees with the Commission that Section 76.922(e)(2)(iii)(C) should be eliminated even though it is relevant to both the CPST and the BST rate setting processes.[55] Specifically, the rule primarily addresses mid-year rate adjustments for a cable operator's CPST offerings, but also permits a cable operator that offers only a single programming tier—effectively the BST—to undertake a mid-year rate adjustment of its BST rates. The State is unaware of any cable system that offers only a single programming tier. In any event, cable operators should be discouraged from seeking mid-year rate adjustments and elimination of this rule will have the practical effect of preventing such rate adjustments to BST offerings.

[54] *See id.*, ¶ 35.

[55] *See id.*, ¶ 36.

B. It May be Appropriate to Modify the Restrictions in Section 76.980 Regarding Subscriber Changes in Service Tiers

As the *FNPRM* observes, Section 76.980 of the Commission's rules implements Section 623(b)(5)(C) of the Communications Act, which addresses unreasonable charges for changes in the subscriber's selection of services or equipment that are subject to regulation.[56] Continued enforcement of this rule remains important with respect to subscriber changes involving the BST, but possibly not involving the CPST given that it is no longer subject to rate regulation. Therefore, the Commission may want to consider additions to the language of the rule that clarifies that any decision by a subscriber to downgrade from a combination of CPST and BST offerings to solely the BST offering is subject to the restrictions on unreasonable charges. In contrast, it may no longer be necessary to enforce the Section 76.980 restrictions with respect to a subscriber that adds one or more CPST offerings. Arguably, cable operators should have adequate incentives to encourage subscribers to add additional CPST offerings and therefore less reason exists to be concerned that cable operators would impose unreasonable charges for such changes. In contrast, cable operators have no incentive to make it easy for subscribers to drop CPST offerings in favor of solely receiving the BST and, therefore, such subscriber changes must continue to be regulated.

C. The State Does Not Object to the Elimination of the Section 76.982 Exception for Pre-1990s Franchise Agreements

The State concurs with the *FNPRM* proposal to eliminate the exception that exists in Section 76.982 for cable franchise agreements entered into before July 1, 1990 allowing such agreements to supersede Section 623 of the Communications Act.[57] The State is unaware of any

[56] *See id.*, ¶ 37.

[57] *See id.*, ¶ 38.

franchise agreements of this vintage that remain in effect today. Obviously, however, if a franchising authority or cable operator identifies such an agreement in this proceeding, the Commission should consider the potential impact of eliminating Section 76.982 on that specific agreement.

D. The Uniform Rate Requirement Must Continue to be Enforced in All Locations Where Effective Competition Does Not Yet Exist Throughout the Franchise Area

Congress clearly identified the anticompetitive impact that could result in permitting cable operators to offer the same cable services for different prices within different portions of the same franchise area where effective competition is absent in all or a portion of the franchise area. Cable operators could use such price variations to undercut and prevent competitive entry in some portions of its franchise area, while charging excessive rates in other areas where competitive entry is less likely, such as low income areas. Congress sought to prevent such anticompetitive tactics through the adoption of its uniform rate requirement.

As the *FNPRM* observes, the uniform rate requirement is provided in Section 623(d) of the Communications Act and was therefore unaffected by the sunset of CPST rate regulation that was included by Congress in Section 623(c) of the Act.[58] Therefore, the uniform rate requirement continues to apply to all tiers of service unless the franchise area as a whole is subject to effective competition. The State believes that the rule continues to further the public interest in communities that lack effective competition and, therefore, the Commission is compelled to keep this statutory mandate in place.

[58] *See id.*, ¶ 39.

E. The Commission Should Retain its Rules Governing its Forfeiture Authority for Complaints Involving Regulated Equipment Rates

The *FNPRM* raises the potential of eliminating Section 76.963 of its rules, which addresses the Commission's forfeiture authority resulting from Commission orders in response to complaints about unreasonable rates for CPST offerings and cable equipment.[59] The State acknowledges that, given the deregulation of the CPST, it would appear to be appropriate to remove from Section 76.963(a) and (b) references to unreasonable "cable programming service" rates. The Commission, however, should retain the rule given its concurrent references to unreasonable equipment rates. As discussed in previous sections of these comments, it remains very important to continue to enforce rate regulation requirements for equipment used to receive the BST in communities that lack effective competition. Consistent with this need, the Commission should continue to clearly articulate in its rules its forfeiture authority for failures by cable operators to comply with Commission orders responding to complaints regarding unreasonable equipment rates.

VII. CONCLUSION

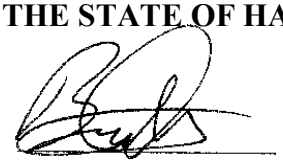
Cable rate regulation continues to provide important public interest benefits for consumers in communities that continue to lack effective competition in the market for multichannel video programming services. Given its continued importance, the State supports a long overdue clean-up of the Commission's rules for cable rate regulation. The State, however, does not support any initiative that would involve wholesale revisions to the cable rate rules. Any

[59] *See id.* ¶ 40.

substantial changes would impose tremendous administrative burdens on federal, state and local franchising authorities, while producing few, if any, benefits to consumers.

Respectfully submitted,

THE STATE OF HAWAII

By: 

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